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No. 95-865

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

WINSTAR CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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1. Respondents do not allege that the unmistakability doctrine is inapplicable in this case. Instead, they contend that the court of appeals applied the doctrine. Glendale Br. in Opp. 11; Winstar Br. in Opp. 20. That contention is insupportable.

a. The court of appeals made no reference to the unmistakability doctrine—or to any analogous principle—in the portion of its opinion in which it determined whether the contracts at issue contained the disputed promise. See Pet. App. 16a-29a. The court did not suggest or imply in this portion of its opinion that any special rule of clear statement or unmistakability should be applied. The court simply examined the contracts in this case in the same way as it would have examined any other commercial contracts.

b. The Federal Circuit stated that the reason it did not apply the unmistakability doctrine was that respondents' request for money damages did not implicate the

interests that the doctrine protects. Having completed its analysis of the terms of the contract with no reference to the unmistakability doctrine, the court only then addressed our claim "that the contracts failed to secure unmistakably the government's contractual obligations in the face of legislative change (the 'unmistakability doctrine')." Pet. App. 31a. The court noted that the Court of Federal Claims initially rejected the government's invocation of the unmistakability doctrine on the ground "that plaintiffs sought only money damages, which did not implicate the government's power to regulate." Pet. App. 32a. The court then made clear that it also was refusing to apply the doctrine in this case by concluding that "the Court of Federal Claims *properly rejected* the government's argument based on *POSSE* that its sovereign power to legislate is at issue here." Pet. App. 37a (emphasis added). The court explained:

> Money damages, in contrast to injunctive relief, presents little threat to the government's sovereign powers, other than the obvious financial incentive to honor its contracts. The Supreme Court's decision in *POSSE* is predicated on the need to protect the sovereign's legislative power *and that concern is inapplicable where money damages alone are at issue.*

Pet. App. 37a-38a (citation omitted and emphasis added).[1] Rather than defend this reasoning, respondents simply fail to acknowledge it.

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[1] If there were any doubt that the Federal Circuit's refusal to apply the unmistakability doctrine was based on the fact that respondents sought only money damages, the court of appeals' discussion of the D.C. Circuit's decisions in this area should dispel it. In *Transohio Sav. Bank* v. *Director, OTS*, 967 F.2d 598 (D.C. Cir. 1992), the D.C. Circuit had applied the unmistakability doctrine in a case analogous to this one, except that the plaintiffs there sought injunctive relief. Later, in *Transcapital Fin. Corp.* v. *Director, OTS*, 44 F.3d 1023 (D.C. Cir. 1995), the D.C. Circuit stated that the analysis in *Transohio* was limited to cases involving injunctive relief. Commenting on that second D.C. Circuit holding, the Federal Circuit stated that it "complements our [own] decision." Pet. App. 38a. If respondents were correct that the Federal Circuit applied the unmistakability doctrine in the present case, the Federal Circuit's result would, however, directly conflict with the distinction made by the D.C. Circuit in *Transohio* and *Transcapital*.

As we explained in the petition, the court of appeals erred in finding the unmistakability doctrine inapplicable to cases seeking money damages. Pet. 13-16. The unmistakability doctrine, as articulated in *Bowen* v. *Public Agencies Opposed to Social Security Entrapment (POSSE)*, 477 U.S. 41, 52-53 (1986), *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982), *United States* v. *Cherokee Nation*, 480 U.S. 700, 707 (1987), and earlier cases, has nothing to do with the form of relief sought for a breach of contract. Those cases were concerned with claims that the government had contractually agreed not to exercise sovereign authority, not with the relief that might be awarded if such promises were violated. Indeed, *Cherokee Nation* itself involved a claim for money damages; the Court nonetheless applied the unmistakability doctrine without suggesting in any way that the claim for money damages cast doubt on the applicability of the doctrine.

c. The contracts in this case could not possibly be construed to "unmistakably" make the promises respondents claim regarding supervisory goodwill. As explained in the petition, that becomes clear by comparing two provisions. Respondents rely on Bank Board resolutions like the following:

> [in] report[s] to the Bank Board and the FSLIC, * * * any unidentifiable intangible assets resulting from accounting for the Acquisition * * * in accordance with the purchase method of accounting may be amortized by [the thrift] over a period not in excess of twenty-five (25) years by the straight line method.

Pet. App. 25a-26a. That provision makes no mention of federal capital requirements or any governmental com-

mitment regarding how such requirements will be imposed. In contrast is Statesman's contract with FSLIC regarding its capital credits, which provides:

> For the purposes of reports to the Bank Board * * *, $26 million of the contribution [made by FSLIC] *shall be credited to* [*Statesman's*] *regulatory capital account and shall constitute regulatory capital* (as defined in § 561.13 of the Insurance Regulations).

C.A. App. 803 (emphasis added). That provision makes a clear reference to regulatory capital requirements.

It was thus clearly possible to formulate contractual commitments regarding the regulatory treatment of intangible assets. With respect to the capital credit, Statesman and FSLIC did so unmistakably (though with other provisions of the agreement allocating the risk of later legislative change to Statesman, see Pet. 18). None of the thrifts did so, however, with respect to supervisory goodwill other than Statesman's capital credit. The court of appeals was therefore able to reach the result that it did only because it found no need to apply the unmistakability doctrine.[2]

[2] Respondents devote a great deal of attention to explaining why they would not have entered into the transactions without a promise that they could treat the resulting goodwill as capital for a period of decades to come. See Winstar Br. in Opp. 5-7; Glendale Br. in Opp. 5-9. The Statesman provision regarding capital credits makes clear that, had respondents needed the commitment they claim, they could have attempted to obtain it in clear, unmistakable terms. See *Transohio*, 967 F.2d at 619-620 ("We are reluctant to compensate for the absence of an unmistakable waiver given that * * * the transaction was heavily lawyered and * * * extensively negotiated."); *Guaranty Financial Services, Inc.* v. *Ryan*, 928 F.2d 994, 999 (11th Cir. 1991) (thrifts "in effect wager[ed] the chance that the rules would be changed against the potential return if they were not"). Moreover, there are many reasons why the thrift managers would have been willing to enter into these transactions without such commitments. See, *e.g.*, Nat'l Comm'n on Financial Inst. Reform, Recovery and Enforcement, *Origins and Causes of the S&L Debacle: A Blueprint for Reform, A Report to the President and Congress of the United States* 38-39 (1993) (explaining how acquisitions of insolvent thrifts "were tempting to other [thrifts] trying to stave off accounting insolvency because acquirers could show fictitious income and continue to pay (indeed increase) dividends, high salaries, and so on"); W. Black, *Ending Our Forebearers' Forbearances: FIRREA and Supervisory Goodwill*, 2 Stanford Law & Policy Rev. 102, 104-105 (1990).

Respondents rely on (Glendale Br. in Opp. 9) the court of appeals' descriptions of the government's alleged promise as "an express contractual obligation." Pet. App. 17a. That description, however, does not substitute for the analysis required by the unmistakability doctrine—an analysis that the court of appeals did not purport to apply and in fact specifically disavowed. Nor can such characterizations alter the fact that—aside from the Statesman capital credit—none of the various provisions of contracts or Bank Board resolutions cited by respondents or the courts below even mention the existence of federal capital requirements, much less unmistakably make promises regarding their application to respondents.

Respondents also cite (Glendale Br. in Opp. 12, Winstar Br. in Opp. 13) the Court of Federal Claims' statement, repeated by the Federal Circuit, that "there has been little serious dispute that the government granted the acquiring thrifts, in the clearest possible terms, the right to certain types of regulatory capital treatment." Pet. App. 36a. The court then described the government's argument as focusing on whether the government may be excused from a breach of such a commitment. The court's statements demonstrate its incorrect characterization of the government's position. The government has never denied that, prior to December, 1989, its regulatory policy permitted goodwill to be included in thrift capital calculations. But the government has argued throughout this litigation *that it did not contract to maintain that policy for 25-40 years into the future.*[3]

[3] Respondents are wrong in asserting (Winstar Br. in Opp. 16, Glendale Br. in Opp. 12) that our unmistakability argument is in-

2. Respondents also claim that the decision in this case does not conflict with the decision in *Charter Federal Savings Bank* v. *OTS*, 976 F.2d 203 (4th Cir. 1992), cert. denied, 113 S. Ct. 1643 (1993), because the Fourth Circuit in *Charter* noted that that case "did not involve a written contract of any kind between [the thrift] and the government." Winstar Br. in Opp. 20 n.6; see also Glendale Br. in Opp. 15-16. Respondent's claim is incorrect.

The Fourth Circuit in *Charter* stated that it was "reluctant to rule that a contract exists" between the thrift and the government on the facts of that case. 976 F.2d at 211. But the Fourth Circuit did *not* resolve the case on the ground that there was no such contract. Instead, it stated that "we need not decide the contract issue because we find, in any event, that the [Federal Home Loan Bank Board] did not promise to exempt Charter from the future capital regulations." *Ibid.* The Fourth Circuit stated that it would "assume, then, without deciding, the existence of an implied contract between the [Bank Board] * * * and [the thrift] *and resolve the case on the issue of contract interpretation.*" *Ibid.* (emphasis added). As explained in the petition (Pet. 16-17), the primary principle of "contract interpretation" that the Fourth Circuit used was the unmistakability doctrine (which the Federal Circuit refused to apply here), and the Fourth Circuit concluded on the basis of that doctrine (contrary to the Federal Circuit in this case) that the thrift regulators "approved [the thrift's] use of supervisory goodwill under its then statutory discretion to permit such accounting practices, *but made no explicit promise to [the thrift] of continued approval throughout the life of the amortization period.*" 976 F.2d at 212 (emphasis added).

consistent with this Court's decisions in *Lynch* v. *United States*, 292 U.S. 571 (1934), and *Perry* v. *United States*, 294 U.S. 330 (1935). There was no question in those cases that the government had made the contractual promises at issue, and that the government officials who made the promises had the authority to do so. Nor did the promises at issue in those cases involve the government's exercise of sovereign regulatory authority. See Pet. 23 n.10.

3. Respondents state that they "have never argued, and the courts below did not hold, that respondents' contracts either bound Congress not to enact contrary regulatory capital requirements or prohibited it from applying any such requirements to respondents." Winstar Br. in Opp 21; see also Glendale Br. in Opp. 18. In their view, because the breaches of the alleged promises can be vindicated by the payment of money damages, rather than injunctive relief, there need be no concern whether the pre-FIRREA thrift regulators had authority to enter into contracts that bound the government as a whole—including Congress—to exercise its regulatory authority in a certain way.[4]

Respondents' claims in this case, however, depend on the proposition that the thrift regulators had authority to bind the government to follow certain regulatory policies for 25-40 years, and that the regulatory authorities exercised that authority in the contracts at issue here. If the government incurred no such obligation, respondents would have no claim in this case. If, for example, respondents were merely claiming that the thrift regulators agreed to exercise what discretion they had under the then-existing statutory scheme to permit favorable regulatory treatment of supervisory goodwill, respondents would have no claim for breach of contract when that

[4] Under respondents' theory, the regulators could have promised that the thrifts would not be required to maintain more than a set percentage of their assets as capital for periods of 25, 40, or even 100 years. Or they could have granted respondents exemption from other regulatory requirements for similar lengthy periods of time. According to respondents, Congress's grant of authority to the regulators "to make contracts" was sufficient to permit them to bargain away the government's entire thrift regulatory scheme for more than a generation—so long as a breach of any such promise could be remedied by money damages.

discretion was removed by FIRREA. Respondents' claim, therefore, must be understood as a claim that the thrift regulators had the power to bind the government as a whole—including Congress—to a particular exercise of its regulatory authority for periods of 25-40 years.

4. Respondents claim, as they did in the court of appeals, that FIRREA is not a "public and general act" for purposes of the sovereign acts doctrine, because FIRREA's restrictions on intangible capital "were *targeted* at *supervisory* goodwill, whose very existence, as Congress well knew, was attributable to acquisition agreements with the government." Winstar Br. in Opp. 28. In another formulation, respondents state that the sovereign acts doctrine does not apply because FIRREA has more than an "incidental" effect on them. Glendale Br. in Opp. 22; Winstar Br. in Opp. 26.

FIRREA imposes a series of general limitations on the use of "intangible assets"—not just supervisory goodwill—to satisfy federal regulatory capital requirements. Those limitations govern all insured thrift institutions in all future situations, and affect many types of intangible assets other than supervisory goodwill and many thrift institutions that had never been involved in transactions in which such goodwill was created. FIRREA's capital requirements were part of a statute that "reshaped the entire thrift industry on a national level" and that "was broadly directed to the good of the general public, to the country's financial system, rather than to a specific contract that it disapproved." Pet. App. 51a (Lourie, J., dissenting). It would be difficult to find a clearer example of a "public and general act." The fact on which respondents appear to rely—that some Members of Congress were aware that FIRREA would affect those in respondents' positions, see Winstar Br. in Opp. 28; Glendale Br. in Opp. 22—does not alter that conclusion. See Pet. App. 51a (Lourie, J., dissenting).

In rejecting the application of the sovereign acts doctrine, the court of appeals relied on FIRREA's "transition rule" giving supervisory goodwill more *favorable* treatment than is accorded to other intangible assets. See Pet. App. 42a. Indeed, the transition rule is the only section of FIRREA that comes close to "singl[ing] out" thrifts in respondents' position.[6] Even if it did so, however, the "special treatment" that respondents received under that rule is more *favorable* than that which would be accorded respondents under the general rule governing intangible assets. The transition rule therefore cannot be said to be the source of respondents' complaints; the court of appeals' reliance on the transition rule to find that respondents are "singled out"—and that FIRREA is therefore not a "public and general act"—is incorrect.

5. Respondents do not dispute that an enormous amount of money is potentially at stake in this case. They do assert that the court of appeals' ruling "does *not* resolve reflexively the liability issues in any of the [approximately 100] other pending cases." Glendale Br. in Opp. 26. But the court of appeals' decision does establish that the unmistakability doctrine will not be applied in any of those cases. It also establishes that promises by thrift regulators regarding exercises of their regulatory authority will be given effect even in the face of legislative changes altering their authority. The Federal Circuit's decision also precludes the application of the sovereign acts doctrine in all of the 100 or so pending cases.

This case is a strong candidate for further review, for additional reasons as well. It was the leading case on these issues in the Federal Circuit. Both courts below authorized interlocutory review under 28 U.S.C. 1292(b) because the three consolidated cases "involved controlling questions of law as to which there is substantial ground for difference of opinion and [because] an immediate appeal may materially advance the termination of these and

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[6] The transition rule applies to all supervisory goodwill, regardless of whether it was created pursuant to a contract. It thus applies to thrifts that are not in respondents' position.

other related cases." Pet. App. 3a. The case presents three different transactions that involve facts common to many other cases. The resulting guidance from this Court should assist in the prompt resolution of the large number of other pending cases.

Respondent Winstar argues that (Winstar Br. in Opp. 29-30) further review is not warranted because the case is in an interlocutory posture. All that remains in the Court of Federal Claims in these cases, however, is the assessment of damages; no further factual record relevant to the issues now before the court remains to be developed. Those issues are not likely to be better presented in any future case.[6]

CONCLUSION

For the foregoing reasons, as well as those stated in our petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JANUARY 1996

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[6] Glendale correctly argues that our sovereign acts defense "does not in any event defeat [its] claims for a constitutional taking or for frustration of purpose, mistake or other quasi-contractual relief," and it infers from that fact that "[t]he availability of such alternative grounds for recovery provides even further reason for the Court to decline review of this issue." Glendale Br. in Opp. 25 n.25. If, however, the thrifts' various other claims are found valid, the measure of damages is likely to be very different from what it would be on the breach of contract claims on which they prevailed in the Federal Circuit. See Pet. App. 47a (Nies, J., dissenting).

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